

SERVED: February 10, 1992

NTSB Order No. EA-3491

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 29th day of January, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

ROBERT GALLOWAY, KEITH PULLEY,  
and PHILLIP WILLIAMS,

Respondents.

Dockets SE-8041, SE-8045,  
and SE-8046

ORDER

By NTSB Order EA-2939 (served May 26, 1989), the Board denied the respondents' appeals from orders of the Administrator alleging that they had violated Federal Aviation Regulations by operating an unairworthy Lockheed L-188 aircraft. On September 4, 1991, the U.S. Court of Appeals for the Eleventh Circuit issued a decision reversing the Board's order on the ground that the Administrator had failed to prove, as he had alleged, that the aircraft respondents had operated was a civil, as opposed to a public, aircraft.<sup>1</sup>

<sup>1</sup>This issue was not litigated here because respondents did not contest the status of the aircraft until closing argument at the evidentiary hearing convened on their appeal from the Administrator's suspensions of their airmen certificates for the alleged operational violations. The law judge in effect ruled, and the Board subsequently agreed, that the respondents had waived their right to challenge the status of the aircraft at the time of the alleged offenses because the matter had not been raised as an affirmative defense prior to the hearing in a responsive pleading.

Since the actual status of the aircraft was determinative of the Administrator's regulatory authority with respect to its operation under one of the charged regulations, the failure of proof was fatal to the Administrator's action against the airmen.

The parties have not, in response to the Court's remand of the case, suggested that any further proceedings before the Board are necessary or warranted.<sup>2</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The orders of the Administrator appealed in Dockets SE-8041, SE-8045 and SE-8046 and the initial decision of the Board's law judge sustaining them are reversed, and
2. The proceeding is terminated.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

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<sup>2</sup>The Administrator has filed a motion, to which no answer was filed, asking the Board to issue an order that would bar respondents in future cases from raising, after the pleading stage of a proceeding, any issue as to an aircraft's status. We will deny the motion, which is in effect a request for rulemaking by adjudication in a case that has no issues remaining to be decided. However, our denial is without prejudice to an appropriate petition for rulemaking on the matter, and it reflects no view that aircraft status issues invariably involve jurisdictional concerns that would limit the Board's ability to control the manner and timing of their presentation through its procedural rules.